Media General Operations, Inc. d/b/a The Tampa Tribune *and* Gregg McMillen. Case 12–CA–24770

December 28, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

At issue in this case is whether the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged employee Gregg McMillen for making a profane and derogatory statement about the Respondent's vice president of operations, Bill Barker. McMillen made the statement at issue while criticizing a series of letters Barker sent to bargaining unit employees, which communicated a summary of the Respondent's view of ongoing contract negotiations and blamed the Union for delays in reaching a contract.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Background

During the course of contract negotiations, Vice President Barker mailed to the Respondent's pressmen a series of letters that described the negotiations. The letters are not alleged to be either inaccurate or unlawful, but they were written from the Respondent's perspective and asserted that the Union was to blame for the slow pace of negotiations. Many pressmen were angered by the anti-union slant of Barker's letters. On November 4, 2005,[2] about 25 employees, including McMillen, signed a letter to Barker responding collectively to his most recent letter. The letter complained about working conditions, placed the blame on the Respondent's management for the lack of negotiating progress, and expressed discontent over the Respondent's refusal to agree to the Union's proposal. The letter also complained that Barker's earlier letters contained suggestions that the employees decertify the Union.

Barker responded to the employees in a letter dated November 9, expressing his understanding of the pressmen's working conditions and the need for patience in collective bargaining; reiterating the Respondent's belief in its collective-bargaining positions; expressing his view that "third parties interfere with both our collective as well as individual successes"; and explaining that "under a union structure" the Respondent could not negotiate with individual employees or a "sub-group" of employees, "as long as you have a third party representative."

On November 10, while working on the evening shift, McMillen heard from a coworker that Barker had sent the pressmen another letter. McMillen had not yet seen the letter, nor was he aware of its contents. During a lull between tasks, McMillen went to the pressroom office and spoke with shift foreman Glenn Lerro and assistant shift foreman Joel Bridges, both admitted supervisors. When Bridges asked how McMillen was doing, McMillen answered "[n]ot too good right now" because he had heard that Barker had sent the pressmen another letter. Lerro stated that Barker's new letter was probably a reply to the employees' November 4 letter. McMillen responded that he didn't feel it was right for Barker to be "harassing" and "threatening" the employees[3] by sending the letters. He continued by saying, about Barker, "I hope that [stupid] fucking [moron][4] doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out on stress."[5] No one else overheard the conversation. Although it is

[1] On February 22, 2007, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Respondent each filed exceptions and a supporting brief, as well as answering briefs to the other party's exceptions, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The General Counsel also filed exhibits related to his request for subpoena enforcement and motion to reopen the record to admit additional evidence obtained pursuant to his subpoena. Because we conclude that the Respondent violated the Act as alleged based on the evidence already in the record, we need not reach the General Counsel's subpoena request, and we find moot the related motion to reopen the record. Finally, the General Counsel filed a motion to strike portions of the Respondent's brief in support of its exceptions because those portions of the brief relied on evidence that the judge excluded from the record. We grant the General Counsel's unopposed motion.

The Respondent excepts to the judge's finding that McMillen adequately asserted a *Weingarten* right to a union representative during the November 16, 2006 meeting at which he was discharged. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In view of the judge's unexcepted-to dismissal of the alleged violation on the ground that *Weingarten* does not apply to noninvestigatory meetings, we find it unnecessary to pass on the judge's finding that McMillen's actions would have sufficed to assert such a right.

[2] All dates are in 2005 unless otherwise stated.

[3] McMillen's testimony referred to Barker's letters harassing and threatening "us." Although he did not specify who "us" referred to, we conclude that he referred to all the employees who were receiving the letters from Barker.

[4] Although McMillen testified that he said "fucking idiot," the judge found, consistent with the testimony of the Respondent's witnesses, that McMillen used the term "stupid fucking moron" or "fucking moron." We find no legally significant difference among the various phrasings.

[5] During this conversation, McMillen also commented on the slow pace of negotiations, according to Lerro, and the Respondent's bargaining position on pay increases, according to Bridges.

disputed whether Lerro and Bridges made any response to McMillen's statements, it is clear that Lerro and Bridges neither instructed McMillen not to curse nor gave him any indication that they thought the incident called for discipline. McMillen completed his shift without further incident.[6]

Later in the shift, however, Lerro sent an email about the incident to Pressroom Manager George Kerr, Production Director George Stewart, and Barker. Lerro's email message described not only McMillen's profane statement about Barker, but also McMillen's statements that Barker "was harassing them with these illegal letters," and that "it was against there [sic] rights to send out such trash and propaganda."[7] Lerro did not recommend any disciplinary action against McMillen; he sent the email to Kerr simply because he thought it was proper "to let him know of any incidents that happen."

Based on Lerro's email, Kerr, Stewart, and Barker agreed that McMillen had engaged in gross misconduct and should be terminated for violating a pressroom rule stating:

> Threatening, abusive, or harassing language, quarreling, boisterousness, wrestling, scuffling, horseplay, disorderly conduct, fighting, violence or threats thereof and all disturbances interfering with employees at work anywhere in the building are prohibited. Employees are expected to exercise common sense and display good manners in the presence of visitors and should refrain from offensive language on such occasions.[8]

When McMillen arrived at work on November 16, he was discharged.

Discussion

As discussed below, we agree with the judge's finding that McMillen's November 10 complaints to Lerro and Bridges were connected to ongoing protected concerted activity. In assessing whether McMillen's statements lost the Act's protection, we also agree with the judge that *Atlantic Steel*, 245 NLRB 814 (1979), sets forth the applicable standard. In disagreement with the judge, however, we find that McMillen's use of a single profane and derogatory reference to Barker was not sufficiently opprobrious to cause him to lose the Act's protection. Thus, we conclude that McMillen's dismissal was unlawful.

I.

Although McMillen went to the pressroom office alone and without any authorization to do so by the Union or his coworkers, his conduct was nonetheless concerted because it was part of an ongoing collective dialogue between Barker and the unit employees about the substance and process of the contract negotiations. McMillen's statements were directly motivated by Barker's November 9 letter to all employees, which responded to the employees' plainly concerted group letter of November 4.[9] By signing the pressmen's November 4 letter, McMillen had identified himself as a member of the group of employees protesting Barker's letters and the positions expressed in them. Thus, McMillen's further comments to Lerro and Bridges on November 10 were "a logical outgrowth" of the prior collective and concerted activity in which he was already engaged. See *Every Woman's Place*, 282 NLRB 413 (1986), and cases cited therein; see also *Midland Hilton & Towers*, 324 NLRB 1141 (1997); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).[10] Moreover, in his statements, McMillen spoke in the plural, not singular, stating that Barker, by his letters, was harassing and threatening "us."[11] In these circumstances, we conclude that McMillen's statements constituted concerted activity.[12]

[6] McMillen apologized to Lerro for his comments several days later, which was apparently the next time he saw Lerro. Although Lerro did not mention the November 10 incident or make McMillen aware that the incident could have disciplinary consequences, McMillen apologized if anything he had said on November 10 was inappropriate, adding "but you know Bill gets to me."

[7] On November 16, at Lerro's request, Bridges also sent an email describing the incident. According to Bridges' email, McMillen further made reference to the pressmen's wages and stated that even if they received a 6 percent pay raise, it would still be less than inflation.

[8] At the hearing, the Respondent's witnesses testified to also relying on the company-wide policy of "fairness, dignity, and respect" and on the "Conduct" rules found in the employee handbook, which state that "Employees should refrain from loud, profane or indecent language and name-calling."

[9] Contrary to the Respondent's contention, the fact that McMillen had not yet read Barker's November 9 letter when he made the remarks at issue does not prevent us from concluding that McMillen's criticism of this letter was concerted activity, especially in view of Lerro's comment to McMillen that Barker's letter was probably a response to the pressmen's group letter.

[10] We distinguish *K-Mart Corp.*, 341 NLRB 702 (2004), in which the Board found no evidence that an employee's profanity-laced comments about a new rule were concerted. In *K-Mart*, unlike here, there was no evidence of any related conduct by other employees, let alone evidence that the alleged discriminatee had participated in such conduct.

[11] Further, in response to his separate discipline a few days later, McMillen ironically thanked the Respondent "for not caring about are [sic: presumably "our"] well being" in relation to Barker's letters.

[12] The General Counsel excepts to the judge's further conclusion that McMillen's statements were not union activity. We find it unnecessary to reach that issue, in light of the finding that the statements were protected concerted activity.

II.

Longstanding Board precedent establishes that "employees are permitted some leeway for impulsive behavior when engaging in concerted activity," subject to the employer's right to maintain order and respect.[13] *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994). To assess whether an employee's admittedly impulsive and unwise conduct is so severe that it outweighs his or her Section 7 rights, we apply the balancing test set forth in *Atlantic Steel*, supra.[14] In deciding whether the employee's conduct crosses the line, we "must carefully balance" four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB at 816.

a.

We adopt the judge's unchallenged findings with regard to the first two factors. As the judge found, the discussion occurred in an office, away from any other rank-and-file employees, and thus could not have affected workplace discipline or undermined Barker's authority. And the subject matter was McMillen's criticism of the Respondent's bargaining tactics and positions, as well as Barker's repeatedly sending employees letters perceived to be one-sided, involving issues that many pressmen had similarly commented on both critically and collectively. McMillen's expression of his opinion on these topics is a fundamental Section 7 right. Thus, for the reasons stated by the judge, we conclude that both the place of the discussion and the nature of the subject matter weigh in favor of protection for McMillen's remarks.

We further adopt the judge's finding that the fourth factor weighs slightly against McMillen retaining the Act's protection. McMillen's statements were provoked by Barker's letters, which were lawful communications. See *Verizon Wireless*, 349 NLRB No. 62, slip op. at 3 (2007) (holding that provocation factor weighed against protection where employee's outburst was provoked by employer's *lawful* email criticizing the union).[15]

b.

We part company with the judge, however, regarding the third *Atlantic Steel* factor, the nature of McMillen's outburst. Although McMillen's reference to Barker as a "stupid fucking moron" was clearly intemperate, we find that the nature of McMillen's remark weighs only moderately against his retaining the Act's protection.

First, we find it significant that McMillen's statement, although it was *about* Barker, was not *directed at* Barker (i.e., McMillen did not insult Barker to his face), and there were no other confrontational aspects to it, such as physical conduct or threats. Second, McMillen made the statement only once, and he later apologized and sought to explain himself, spontaneously and at his own initiative, not because of any realization of forthcoming consequences or hope of forestalling them. Indeed, at no time before his November 16 discharge was McMillen informed that his remark deserved any sort of official response or discipline, let alone termination.[16] Further, although McMillen's private remark was disrespectful, it was not insubordinate in regard to production or work assignments, nor did it serve to directly challenge Barker's managerial authority. Based on the foregoing facts, we find this case distinguishable from cases cited by the Respondent.[17]

[13] Consequently, the relevant legal issue is not whether (in the judge's words) "McMillen could have expressed his anger about the letters without defaming Barker as he did," or even whether McMillen *should* have done so.

[14] Contrary to the Respondent's contentions, we do not apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1982), in the absence of a dispute about the Respondent's motive for discharging McMillen. Nor do we consider the use of particular offensive words as a separate and independent basis for the discharge. See *Thor Power Tool*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965) (the profanity is part of the res gestae of the otherwise-protected conversation).

[15] Member Liebman and Member Walsh disagree with the Board's limitation of "provocation" evidence to conduct that constitutes an unfair labor practice. In this case, McMillen may reasonably have been provoked partly by Barker's repeated hints that the pressmen should decertify the Union. While the complaint does not allege that Barker's remarks are unlawful, their provocative effect on a prounion employee is neither unexpected nor unreasonable. In Member Liebman's and Member Walsh's view, Barker's statements tend to mitigate the egregiousness of McMillen's outburst, although to a lesser degree than had Barker's comments been litigated and found to be legally proscribed.

[16] To the extent that the Respondent's own perception of the egregiousness of McMillen's remarks is relevant, we find that the evidence does not clearly establish how atypical his remarks were in the context of the pressroom work environment, which the evidence reflects was the locus of considerable profanity. We find it significant that Lerro did not recommend any discipline but merely reported the incident as a matter of duty. Moreover, Lerro himself had called his supervisor a "fucking idiot." (The judge gave this evidence little weight but did not discredit it.) McMillen's profane and derogatory statement about Barker arguably differed in quality or severity from the usual use of profanity in the pressroom, but it is not evident that the supervisors who actually heard it perceived it as egregious.

[17] Compare, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee cursed repeatedly and loudly before witnesses, refused supervisor's repeated requests to move discussion into office, made threats toward supervisor, and was terminated in part for his refusal to follow orders); *Daimler Chrysler*, 344 NLRB 1324 (2005) (employee cursed repeatedly in front of many other employees, called supervisor an "asshole" to his face, and physically approached supervi-

Finally, for the purposes of assessing whether opprobrious statements may cause the loss of the Act's protection, we find no basis to draw distinctions based on the high-level position of the official to whom the reference is made. In any event, Barker's position as the Respondent's chief negotiator and his decision to criticize the Union in letters to employees over issues that directly relate to bargaining table disputes reasonably triggered a response directed at him.[18] Neither Barker's position nor his choice to disseminate to employees his view on negotiations shield him from ill-tempered rejoinders.

c.

Because we weigh the third *Atlantic Steel* factor differently from the judge, we come to a different overall balance.[19] We find that the location and subject matter of McMillen's statements, which weigh moderately to strongly in favor of his retaining the Act's protection, more than offset the nature of his outburst and the lack of provocation by unfair labor practices of the Respondent, which weigh slightly to moderately against protection. Thus, contrary to the judge, we find that McMillen's statements on November 10 retained the protection of the Act despite his profane and derogatory remark about Barker. Because McMillen's statements were protected, the Respondent's termination of his employment based on those statements violated Section 8(a)(1).

REMEDY

Having found that the Respondent discriminatorily discharged Gregg McMillen as indicated above, we shall order the Respondent to offer him immediate reinstatement to his former position or to a substantially equivalent one if his former position no longer exists. We shall also order the Respondent to make him whole for all loss of earnings and other benefits in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), along with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also remove from its files all references to the unlawful actions taken against Gregg McMillen and advise him in writing that it has done so.

ORDER

The National Labor Relations Board orders that the Respondent, Media General Operations, Inc., d/b/a The Tampa Tribune, Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gregg McMillen full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Gregg McMillen whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Gregg McMillen, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix."[20] Copies of the notice, on

sor in an "intimidating" manner); *Trus Joist Macmillan*, 341 NLRB 369 (2004) (employee called supervisor names to his face in front of other managers, repeated his comments after being warned to stop, made sexually insulting gestures and statements to supervisor, and was terminated for insubordination); *Aluminum Co. of America*, 338 NLRB 20 (2002) (employee's "tirade" was repeated, sustained, and very public); *Piper Realty*, 313 NLRB 1289 (1994) (employee's cursing directly at supervisor was heard by other employees and occurred in the course of employee's refusal to perform work assignment; also, employee refused to leave supervisor's office when he was told to).

[18] The record indicates that the Union's chief negotiator had made essentially identical remarks directly to Barker during negotiations attended by several unit employees.

[19] In any event, we disagree with the judge's tacit (and perhaps inadvertent) implication that the final outcome is determined simply by counting the number of factors favoring and disfavoring protection, and that an equal balance of two factors on each side dictates a conclusion that the conduct lost the Act's protection. See, e.g., *Success Village Apartments, Inc.*, 347 NLRB No. 100, slip op. at 5 (2006) (finding employee's outburst protected, where location and subject matter of discussion weighed in favor of protection, while nature of outburst and lack of provocation weighed against protection).

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 16, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 28, 2007

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge any of you or otherwise discriminate against you because you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days after the Board's Order, offer Gregg McMillen full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Gregg McMillen whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Gregg McMillen, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MEDIA GENERAL OPERATIONS, INC. D/B/A THE TAMPA TRIBUNE

Rachel Harvey, Esq. and *Christopher Zerby, Esq.,* for the General Counsel.

Glenn Plosa, Esq. and *Ben Bodzy, Esq. (*The Zinser Law Firm*),* for the Respondent.

DECISION

STATEMENT OF THE CASE

Joel P. Biblowitz, Administrative Law Judge. This case was heard by me on December 4 and 5, 2006, in Tampa, Florida. The complaint herein, which issued on August 30, 2006, and was based upon an unfair labor practice charge and an amended charge that were filed on December 7, 2005,[1] and January 26, 2006, by Gregg McMillen, an Individual, alleges that Media General Operations, Inc., d/b/a The Tampa Tribune, herein called Respondent, violated Section 8(a)(1) of the Act on about November 16, by denying McMillen's request to be represented by Graphic Communications Conference of the International Brotherhood of Teamsters, Local 180, formerly known as Graphic Communications International Union, Local 180, herein called the Union, during an interview, even though McMillen had reasonable cause to believe that the interview would result in disciplinary action being taken against him, and the Respondent conducted the interview on November 16, despite the fact that it had denied McMillen's request for union representation at the interview. The complaint, as later amended, further alleges that on various dates between December 2004 and November, McMillen made concerted complaints regarding the wages, hours, and working conditions of Respondent's employees, including complaints protesting letters sent to the employees by vice president of operations Bill Barker, in

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1]Unless indicated otherwise, all dates referred to herein relate to the year 2005.

December 2004, and on June 2, September 1, September 30, and November 1, regarding the collective-bargaining negotiations between the Respondent and the Union, and including complaints protesting Barker's letter dated November 9, replying to an employee group letter dated November 4, concerning the negotiations. Finally, the complaint alleges that the Respondent discharged McMillen on November 16 because of these Union, and protected concerted activities, in violation of Section 8(a)(1)(3) of the Act.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

A. The Protracted Negotiations

The Union and its predecessor have represented the Respondent's press room employees for many years. The most recent contract between the parties expired on October 31, 2004. The genesis of this case is the protracted collective-bargaining negotiations between the Respondent and the Union and letters that Barker sent to the unit employees between December 2004 and November, blaming the Union for the lack of progress in these negotiations.

The first letter that Barker sent to the unit members, dated December 28, 2004, stated that at the initial meeting the Respondent felt that the negotiations could be completed in 1 day, but because the Union's International representative, Sonny Shannon, was unfamiliar with the issues and history at the facility, the meeting adjourned without any agreement. The next letter, dated June 2, stated that at the negotiations that day and the prior day, Shannon called Barker a "fucking idiot," threatened a strike, an advertiser boycott and a circulation boycott, threatened to bury the Respondent and cursed and raised his voice throughout the negotiations. Further, at this meeting, the Respondent proposed a merit pay offer, which Shannon said he could never agree to. The letter concluded: "No further meetings are scheduled although I am certain some will occur in the near future. I must say that it appears from these meetings we will be negotiating for a long time. We would like to get a contract soon. But make no mistake about our resolve to achieve a good contract. We are willing to negotiate in good faith as long as it takes."

The next letter from Barker dated September 1, begins by saying: "It is a top priority of mine to make sure the lines of communication are open between Pressroom employees and your management team." The letter referred to the "unprofessional behavior" of Shannon at the prior meeting referred to in the June 2 letter ". . . and the consequences that you might face as a result of his behavior. We were very disappointed with the way he chose to approach negotiations and we knew you would want to hear it from us and not the grapevine. Also, since then, your union's representative has been unresponsive to our invitations to meet. However, on August 30, he finally agreed to meet with us on September 26 and 27—a total of one and one-half days." The next letter, dated September 30, dealt with the bargaining sessions conducted on September 26 and 27; these were the bargaining sessions that McMillen attended. The letter states that the first day was disappointing and unproductive. In addition, it states that Shannon was verbally abusive, again used profanity, threatened an advertising boycott, as well as making other threats. On the second day, "The union finally addressed our Management Rights Proposal" and the parties reached agreement on that issue. He continued: "Although progress was made, we are concerned about the slow pace of negotiations. . . Threatening behavior and other unprofessional tactics will not result in your getting a quicker increase. Also, at this time we do not have any additional dates set for more negotiations." At the conclusion of the letter Barker states:

> Finally, a few thoughts about these letters. The union's Pittsburgh based negotiator, Sonny Shannon, complained about my last letter to you. He said he was going to file an "unfair labor practice charge" because of the letter. The only purpose for this action would be to try to censor or prevent my communications to you. That is neither right nor in your best interest. Mark Donoghue [Secretary of the Union] admits there is nothing untrue in the letters. The union is free to communicate. We, as a newspaper employer, stand for freedom of speech. The union needs to respect your right to be informed. Our sole purpose of these letters is to inform you of what we know and understand to be true. It is important to us that we have a common understanding of the truth. We also want to make sure you are informed and have answers to your questions.

Barker next wrote on November 1 ". . . to keep you informed of our progress with negotiations with Local 180." The letter states that the Respondent proposed bargaining dates of October 24 and 25, but these dates were not acceptable to the Union, and that Shannon stated that he was not available until after November 28. The Respondent then proposed the dates of December 14 and 15, giving Shannon until October 26 to reply; he had not replied by that date, but did call on October 28 to say that he was available on December 14 and 15: "We at least hope that, in the future, the Union will respond more promptly. The next time, the available dates may be lost, thus delaying us further."

By letter to Barker dated November 4, signed by more than twenty five pressmen employed by the Respondent, including McMillen, the employees wrote, inter alia:

> Thanks for your recent letter updating us on the status of the contract meetings. . .
>
> Here's the reality: You sit in your nice clean, quiet office, chat with people in business suits, and go out to lunch. We work in noise so loud we need hearing protection, breath chemical fumes and ink mist, handle hazardous MSDS listed chemicals and we are not allowed to leave the premises for lunch- not even to Publix. There are no carpets or pretty pic-

> tures on our walls, just steel plate floors and various warning labels attached to presses, doors and walls. We work with equipment that can strip the flesh off our bones, and mangle us. Will a pencil sharpener or stapler do that?
>
> You get your raises, yet we are denied. For two years now. You seem to forget that there is more than one proposal on the table.
>
> Please stop playing the Sonny/Zinser game and *sign the union proposal* [emphasis supplied]. Sign the union proposal and help us feel confident our management team is as thankful for our efforts as you say and write.

Barker responded to this letter on November 9, writing to the employees, inter alia:

> I have received the attached November 4 letter in response to my recent letter informing you of upcoming negotiations. I appreciate your open communications which gives us an opportunity to address a couple of your points.
>
> . . . Your letter indicates to me a frustration with the Collective Bargaining process. Patience is the model here. We are going to be as patient as necessary to get a good Collective Bargaining Agreement.
>
> Second, let me say I truly respect and honor what you do as press operators and apprentices. Having been a pressman for a few years, I indeed know first hand your contributions and I value them. I know the risk, the fun and the pride your work brings. I know the frustrations and the desire to be and to do your best at the Tampa Tribune. It is recognized and appreciated. We want to reward you. We believe this should be done on individual merit. Merit is what got me promoted and recognized for my abilities. That is why I believe that third parties interfere with both our collective as well as individual successes. . .
>
> Now let's review some of the concerns. As you well know, a contract is binding on both parties and it is the responsibility of all of us to come to a mutually acceptable agreement. We appreciate your letter but we cannot individually negotiate or negotiate with a sub-group. You have a committee representing you and you need to realize under a union structure they are accountable for your satisfaction with this process. As long as you have a third party representative, we are bound to bargain over these types of issues at the table. On occasion, that takes time. In your case we had hoped that time required would be short as your representatives have already signed a contract that contains the proposals currently on the table. . .
>
> In terms of being at the helm, folks, again understand, we are at the helm. It is our goal to lead everyone to a good Collective Bargaining Agreement. We believe we could have that Collective Bargaining Agreement really soon if only the union could see its way to agree to a Collective Bargaining Agreement substantially similar to the one your union signed a couple of years ago with the Paperhandlers at the Tampa Tribune. So far, the union has said, "no way." We believe in our proposals, and we are going to persevere. . .

McMillen received each of Barker's letters, and on most of the occasions after receiving the letters, he spoke to the foremen about them complaining that Barker always blamed the Union for the lack of progress in negotiations, although he and other unit employees testified that there is nothing in the letters that is factually incorrect. Hale testified that he discussed Barker's letters with McMillen: "Well, he got pissed off getting these letters. . . He didn't like them. I got one too, and I didn't like mine either. . ." In addition, at a few of the negotiating sessions, Shannon complained to Respondent's counsel about these letters and said that they were written by a fucking idiot. Respondent's counsel responded that they had a constitutional right to write the letters.

B. The Events of November 10

McMillen reported for work on the second shift on November 10. At about 9 that evening another employee told him that he had received another letter from Barker, which McMillen had not yet received. McMillen testified that later that evening, at about 11:30, he went into the office in the pressroom; Glenn Lerro, the pressroom foreman, and Joel Bridges, the assistant foreman, were in the office at the time. McMillen closed the office door and asked how they were doing, and they said pretty good. Bridges asked how he was doing, and he said, "Not too good right now. I am a little stressed out. I heard we got another letter from Bill Barker." Lerro asked him if he read the letter yet, and McMillen said that he hadn't read it yet. Lerro said that he probably didn't know what was in it, and it was probably a reply to the pressmens' November 4 letter. McMillen said that he didn't feel that it was right that Barker was "harassing" and "threatening" them by sending the letters. Lerro said that there was nothing that he could do about it, and McMillen said: "I hope that fucking idiot doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out on stress" and he left the office. He testified that neither Lerro nor Bridges commented on what he said, and he left work the following morning at about 3 a.m. without further incident, and later that day, November 11, he received Barker's November 9 letter. He testified that he was so unnerved by the letter that he could not sleep and took a sleeping pill, which resulted in him not awakening on time to report for work on November 11. He called Lerro, who told him that he would be a no-call, no-show, which meant that he would miss that shift and his next shift, without pay. On the evening of November 13, Lerro asked McMillen to sign the disciplinary record for his no call, no show 2 days earlier. McMillen signed the record, and wrote on the bottom: "If Billy BOB [Barker] would quit writing me lieing [sic] discrimination, harassing and threatening letters through the U.S. Mail I wouldn't have to take sleeping pills to go to sleep. Thank you Tampa Tribune for not caring about are [sic] well being." McMillen testified that he then told Lerro that he was sorry if anything he said on November 10 was inappropriate, "but you know Bill gets to me." He then returned to work.

Lerro testified that McMillen came into the pressroom office on the evening of November 10 at a time when he and Bridges were in the office. McMillen complained about the letters that Barker had sent to the pressroom employees and was upset

about the slow progress of contract negotiations. He thought that the letters were a form of harassment and called Barker a "stupid fucking moron." McMillen appeared to be agitated and Lerro told him to calm down, because he wouldn't want what he said to get out. On the following morning, Lerro sent an e-mail to George Kerr, the pressroom manager, with copies to George Stewart, production director, and Barker, stating, inter alia:

> Thursday night, Greg McMillen came storming into the office ranting and raving about the letter. What he said was that Mr. Barker is a "Stupid F—g Moron" and that he was harassing them with these illegal letters. He also said that it was against there [sic] rights to send out such trash and propaganda. He said that he had not checked his mail box before leaving for work, but if he had a letter waiting for him at home, he would not be coming back to work because he would "Go Out On Stress." He was very upset and literally shaking. I tried calming him down and defusing the situation, but he just walked out of the office.

Bridges testified that McMillen came to the office shortly before midnight on November 10. He did not walk all the way in to the office; rather, he was by the door directly in front of Lerro, whom he appeared to be speaking to. He said that he was upset by the letter that was sent out and if he got one at home, he probably would not be coming back, and that Barker was a fucking moron. On the morning of November 16, Lerro asked Bridges to prepare an e-mail about the events of November 10. His e-mail to Kerr is similar to Lerro's, but also states that McMillen said that he was insulted that Barker referred to the pressmen as printers, and further stated that even if the pressmen received a 6 percent wage increase, it would still be lower than the rate of inflation.

Kerr testified that after receiving Lerro's e-mail on November 11, he discussed the incident with Stewart, then with Barker, and they decided to recommend that McMillen be terminated for what he said on November 10. Kerr testified that in making the recommendation that McMillen be terminated, he consulted the Respondent's Pressroom Office Rules and determined that Rule 9 applied. The preface of these rules states: "The following list of rules set forth the pressmen's principle office rules which, together with observing all other proper standards of conduct, employees are required to follow. Any employee who fails to maintain at all times proper standards of conduct or who violates any of the following rules shall subject themselves to disciplinary actions, up to, and including termination." Rule 9 states:

> Threatening, abusive, or harassing language, quarreling, boisterousness, wrestling, scuffling, horseplay, disorderly conduct, fighting, violence or threats there of and all disturbances interfering with employees at work anywhere in the building are prohibited. Employees are expected to exercise common sense and display good manners in the presence of visitors and should refrain from offensive language on such occasions.

On the afternoon of November 16, Kerr received a telephone call from Stewart saying that a final decision had been made to terminate McMillen, and that he should return to work to conduct the termination. Stewart testified that after seeing Lerro's e-mail, he discussed the situation with Kerr and they decided that McMillen's statement constituted gross misconduct, and that, as a result, McMillen would be terminated.

C. The Events of November 16

Stewart, Kerr, and Human Resources Manager Rick Sierra met with McMillen at about 6 on November 16 in Stewart's office. McMillen's card activated access to the Respondent's parking lot and building had been deactivated earlier that day, so he was brought to the office by one of the security guards at the facility who was employed by Wackenhut. Kerr testified that McMillen's security badge had been deactivated denying him access to the parking lot and the building because, by that time, "he was no longer an employee. . ." of the Respondent. When McMillen and the security guard came into the office, Donald Hale, another pressman employed by the Respondent was with them. Hale told them that he was there to represent McMillen. Kerr replied that this was not an investigation, and that his services were not needed. Hale then looked over to McMillen and asked, "Is that all right with you Gregg?" and McMillen answered, "I guess." Hale then left. After Hale left, McMillen never requested to have a representative present with him at the meeting. Kerr testified that after everyone sat down he told McMillen that he had learned that McMillen called Barker a stupid fucking moron and "before I could finish, McMillen said: Yeah. I said it. I was pissed off." Kerr was asked by counsel for the General Counsel:

> Q. During the meeting, Mr. McMillen admitted that he referred to Mr. Barker as a fucking idiot or moron, correct?
> A. Yes, he did.
> Q. He made that admission in answer to your question, right?
> A. No, sir. He did not

At that point, Kerr told McMillen that he was terminated effective immediately. As stated above, the decision to terminate McMillen had been made earlier in the day, and if McMillen had not interrupted him at the meeting, he would have completed his statement by telling him that he was terminated effective immediately. McMillen responded by saying that Barker can send him harassing and threatening letters and he can't do anything about it, and Kerr responded by saying, "No, what I'm saying is that you are terminated effective immediately." McMillen was then escorted from the office and the building.

Steward testified that prior to this meeting, he notified the security employees at the building that "we were in the process of fixing to terminate an employee" and that McMillen's security card had been deactivated and that when he came into the building that evening, he was to be escorted directly to Stewart's office. At 3:48 that afternoon, Stewart sent an e-mail to the security department stating: "I would like for the security folks who bring him up to my office stand by [sic] so that he can be taken to his locker and escorted to his vehicle and off the premises. Will that be a problem?" Fifteen minutes later Stewart received an e-mail from security saying that it would not be a problem. At 6 a security officer brought McMillen and Hale to

his office. Kerr asked Hale if he was there in the capacity of a union representative, and Hale said that he was. Kerr said, "Then you can leave. This in not an investigatory meeting." Hale then asked McMillen: "Are you okay with this?" McMillen replied, "I guess so" and Hale left the office. After Hale left, McMillen did not request any union representation at the meeting. Stewart testified:

> Buddy [Kerr] began with a statement to try to . . . say a statement and complete it, but it was to the essence of he couldn't really believe that Gregg had actually called the vice president of operations a fucking moron. At that time Gregg broke in and interrupted and said, wait a minute I was really pissed off about the letters that Mr. Barker had been sending. He had no right to send harassing letters and kept on and then Buddy stopped him at that point and told him. He said, listen, I want . . . to make this perfectly clear to you that your employment with the Tampa Tribune is terminated at this point. Gregg answered back and said, you are going to try to fire me because I'm getting harassing letters from Mr. Barker and Buddy stopped him again and for the second time told him, I want to make this very clear, your employment with the Tampa Tribune is terminated at this point.

Kerr then told the security guard to accompany McMillen to his locker and they left.

Sierra testified that the purpose of this meeting was to terminate McMillen. He had been told early that afternoon that they had made the decision to terminate McMillen, and he was asked to be in Kerr's office later that day as the human resources representative. The procedure that the Respondent employs is that when a decision is made to terminate an employee, the employee's security badge is deactivated, preventing him/her from gaining access to the parking garage and the building without assistance from the security guards at the building. Prior to the meeting, the security employees had been told that when McMillen arrived, he was to be escorted to Kerr's office. The meeting began at about 6 p.m. Hale came into the meeting with McMillen, and Kerr asked him why he was there. Hale said that he was asked to be there by McMillen, and Kerr said, "This is not an investigation. You have no right to be here." After Hale left the office, McMillen never said that he wanted a union representative present with him at the meeting. Sierra was asked by counsel for the General Counsel:

> Q. What was the purpose of that meeting?
> A. It was to terminate Mr. McMillen's employment.
> Q. When asked, Mr. McMillen admitted that he called William Barker a "fucking idiot,", correct? Or "moron?'
> A. He wasn't asked.
> Q. He did admit that, though?
> A. He did admit it…

McMillen testified that when he reported for work on November 16 he swiped his card in the Respondent's parking lot, but the gate did not open, so he pushed a button, and a security guard let him into the parking garage. When he got to the main building, two security guards were waiting for him, and told him that they were told to take him to Stewart's office. McMillen asked the guards if he could get a witness, Hale, one of the Union's chairpersons who was sitting nearby, to go with him. The guards said that he could not have a witness with him, and McMillen said that he was not going without a witness. The guards said that he could go with them, but it was up to the people upstairs whether he would be allowed to go into the meeting with him. McMillen asked Hale to go with him, and the four of them went upstairs to Stewart's office. When they walked into the office, Kerr asked Hale what he was doing there, and Hale said that he was the chairman. Kerr said that he didn't belong in the meeting, and would not be allowed to attend. Hale said that he wanted to be a witness and Kerr replied that he was not allowed to be there because it was not an ongoing investigation. At that point, Hale left the room. He testified that Kerr then asked him if he had called Barker a fucking idiot, and he said, "Yes, what's the problem? Everybody calls him one." Kerr then told him that he was fired, and McMillen asked if it was okay for Barker to send those nasty letters to them, and Kerr said that it was, and he was escorted out of the office by the security guards. McMillen was asked whether he asked to have a union representative present with him at any time during this meeting. He testified: "Did I state that? No. That's why I brought Donny up there." On cross examination, he testified that Kerr was the first one to speak at the meeting after Hale left:

> Q. You would agree with me that you interrupted Mr. Kerr while he was talking, wouldn't you?
> A. I can't say I did or not. I don't believe I interrupted him.
> Q. Isn't it true that Mr. Kerr told you that you were terminated because you called Mr. Barker a stupid fucking moron?
> A. No. He never told me why I was being fired.

Hale testified that on November 16, at about 5:30, as he was in the smoking area shortly before reporting for work, McMillen approached him and said that he needed his help. He went with McMillen and saw the security guards with their arms folded. Hale said that he was going to accompany McMillen to Stewart's office as the union chairman and the guard said that they would not let him go with them. Hale replied that since he was the union chairman he should be allowed to go with him, and the security guards relented, and let him accompany them to Stewart's office. When they arrived at the office, Kerr and Sierra asked Hale, "What are you doing here?" and Hale said that as the union chairman he was there to represent McMillen. He was told that it was "not a union matter so we don't need you here." Hale said that he would just be a witness, and they said, "You can't do that either." Hale then said to McMillen: "They don't want me in here. There's nothing I can do for you. I'm leaving, okay?" McMillen agreed and at that point, Hale left the office.

D. Profanity in the Pressroom

The Respondent alleges that its Pressroom Rules set forth above apply herein. In addition, on September 15, 2003, McMillen signed an acknowledgment that he had received a copy of the Respondent's Employee Handbook. The introduction states that employees who engage in misconduct, or violate rules and policies established by the Respondent, will be subject to discipline up to, and including, termination. Rule (b)

states: "Employees shall refrain from loud, profane or indecent language and name-calling." McMillen testified that pressmen curse on a daily basis in the pressroom. The only time that he has heard a supervisor tell a pressman not to use profanity in the pressroom is when a field trip is touring the pressroom. Hale testified that in his 33 years employment as a pressman for the Respondent he has not witnessed a situation where an employee cursed directly at a supervisor, although it is fairly common to hear the pressmen cursing at the machines.

Jay Farris, who has been employed by the Respondent as a pressman for 18 years, testified that the pressmen curse in the pressroom all the time: "part of the normal conversation." In about November 2006, while he was in the midst of numerous medical visits and tests, he told his supervisor of the situation and said, "I can't wait until this fucking shit is over with . . ." Farris also testified that he attended one of the negotiation sessions where Barker's letter was discussed. After seeing the letters, Shannon referred to Barker as a fucking idiot. He further testified that with the exception of what McMillen said about Barker, he is not aware of any situation where a pressman directed profanity at, or about, a supervisor. Mark Donoghue, who has been employed as a pressman by the Respondent for 20 years, testified that it is a "common practice" to curse in the pressroom. The pressmen curse in front of the foremen on a regular basis, but he cannot remember any situation where a pressman cursed in the presence of the pressroom manager. Donoghue testified about an incident that occurred in either 2000 or 2001. The employees had completed their work for the night and, at the last minute when everyone was preparing to leave, the foreman told Lerro that he had to do something prior to leaving. Later, Lerro told Donoghue that he had called the foreman a fucking idiot. Donoghue was asked by counsel for the Respondent:

> Q. You would agree with me that aside from Mr. McMillen you are unaware of any instance in the pressroom at the Tampa Tribune where an employee has directed profanity at a supervisor in the presence of other supervisors, correct?
> A. Yeah. I would say…it wasn't done with two supervisors there, yeah. I would say that's probably correct.
> Q. Okay. And you are unaware of any employee in the pressroom directing profanity at a supervisor to that supervisor's face, correct?
> A. No. I can't agree with that.
> Q. Calling a supervisor a name, a profane name?
> A. No. Probably not. Yeah.
> Q. That's what I'm referring—I'm not talking about you are stressed because the press is having problems and you let something loose and there's a supervisor standing next to you. I'm talking about a different situation, where you go up to a supervisor. You look the supervisor in the eye and you say: You are something?
> A. No. I have never witnessed something like that.
> Q. And you have never done that yourself, have you?
> A. No.

Lerro testified that, occasionally, he has heard pressroom employees using profanity. While employees have cursed at him, it was in a joking manner. Other than the situation with McMillen, he is not aware of any instance where an employee directed profanity at a supervisor. Bridges testified that during his tenure as a supervisor, no employee has ever directed profanity at him, or at a supervisor. Kerr likewise testified that other than McMillen, he is unaware of any situation where an employee directed profanity at a supervisor. In addition, while he was a rank-and-file employee for the Respondent he never directed profanity at a supervisor. Stewart testified that in his 30 years of employment with the Respondent he is unaware of any situation where an employee cursed at a supervisor, or directed profanity at a supervisor, in the presence of other supervisors.

IV. ANALYSIS

There are two distinct, yet connected issues herein. Did the Respondent violate Section 8(a)(1) of the Act by denying McMillen the right to have a union representative present at the meeting on November 16, where he was terminated, and did the Respondent violate Section 8(a)(1)(3) of the Act by terminating him on November 16?

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court found that employees have a Section 7 right to request union representation at an investigatory interview where they could reasonably believe that the investigation will result in disciplinary action. In *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977), the Board found that the rights associated with *Weingarten* applied to any interview, whether it was labeled as investigatory or disciplinary, as long as the employee involved reasonably believed that it might result in disciplinary action being taken against him. The Court, at 587 F.2d 449 (9th Cir. 1978) refused to enforce the Board's Order finding that *Weingarten* did not require a right to union representation when the purpose of the interview was merely to inform the employee that he was being disciplined. In *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979), the Board reexamined its decision in *Certified* and decided that it was wrongly decided and that it should be overruled: "We now hold that under the Supreme Court's decision in *Weingarten*, an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." In addition, the Board's decision in *Baton Rouge* contains further language that is helpful in the instant matter:

> We stress that we are *not* holding today that there is no right to the presence of a union representative at any "disciplinary" interview. Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded to the employee under *Weingarten* may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach. In contrast, the fact that the

> employer and the employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the *Weingarten* protections apply.
>
> In summary, as long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation under Section 7 exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline.

In that case the Board found that because the employer had reached its decision to discharge the employee 3 days before the meeting where she was informed of the discharge, and the sole purpose of the meeting was to inform her of the discharge, the employee had no Section 7 right to union representation simply because she insisted on continuing the meeting in order to obtain an explanation for the reasons for her discharge.

Texaco, Inc., 251 NLRB 633, 636–637 (1980) is interesting because it involved two distinct situations. In the first, although the employer had evidently decided prior to the meeting that the employee would be given a reprimand, at the meeting he secured an admission from the employee of his wrongdoing. The Board found that the employee was entitled to union representation at the meeting because the employer "went beyond the act of imposing discipline and sought and secured an admission of possible misconduct. Such an inquiry indicated that Respondent was continuing, on a substantive basis, its investigation of the incident." In the second situation, the employer decided, 3 days prior to meeting with the employee, that he would be given a 3 day suspension. At the meeting, the employee was informed that the meeting involved discipline and was handed the suspension letter. When the employee claimed his innocence, the employer's representative began to respond, but stopped, saying that it had no bearing on the issue. The Board decided that no right to representation attached in this situation because the Respondent was ". . . engaged in the simple ministerial act of imposing upon Slater discipline which had been determined in a final and binding manner prior to the interview. . . .At no time did Fair cross the line between an investigatory interview and one solely for the purpose of imposing discipline by seeking or securing information from Slater concerning his alleged misconduct." In *Gulf States Manufacturers, Inc.*, 261 NLRB 852 (1982), the employer decided prior to meeting with the employee (Scott) that he would be given a written warning. Upon meeting with the employee, the employer's representative informed him that he would be given a written warning, but when Scott started to argue the issue, the employer's representative questioned him further about the incident underlying the warning. The Board decided that Scott was entitled to union representation at this meeting: "Respondent's conduct constituted more than merely a conversation concerning its reasons for the previously determined discipline. Rather, Respondent delved further into the circumstances surrounding Scott's justification for his conduct and, in effect, sought further facts in support of its action against Scott."

Applying these cases to the instant matter, it is clear that if, as testified to by McMillen, Kerr opened the meeting by asking him if he had called Barker a fucking idiot, or some similar term, the right to representation under Section 7 would immediately attach. On the other hand if, as testified to by Kerr and Stewart, McMillen interrupted Kerr, as he was about to tell him that he was terminated for calling Barker a stupid fucking moron, and said that he did say it, no right of representation would attach, as long as Kerr did not question him further about the incident. This is a difficult credibility determination because none of the individuals involved in this meeting were either clearly credible or clearly incredible. In addition, there were no obvious discrepancies in the testimony of any of these witnesses that would assist in this determination. With some difficulty, I credit the testimony of Kerr, Stewart, and Sierra over that of McMillen. Kerr had e-mails from the two supervisors who were present when McMillen made the offending statement on November 10, so there was no valid reason for him to ask McMillen whether he really said it. Additionally, the Respondent had spent the prior 5 days deciding how to deal with the situation. After all of that time, I find it highly unlikely that Kerr would begin the meeting by asking McMillen if he had made the statement as alleged. I therefore find that Kerr began the meeting by saying that he had learned that McMillen had called Barker a stupid fucking moron (as testified to by Kerr), or that he couldn't believe that he had made the statement (as testified to by Stewart). Either way, Kerr was not seeking an admission from McMillen, and after McMillen interrupted Kerr and said that he did make the statement, Kerr did not question him further about it; he simply told him that he was fired. *Texaco,* supra. I therefore recommend that this allegation be dismissed.[2]

The principal issue herein is whether McMillen was terminated in violation of Section 8(a)(1)(3) of the Act. This boils down to two separate issues. Was he engaged in protected concerted or union activities on November 10 when he complained to Lerro and Bridges about Barker's letters and, if so, was the language that he employed so egregious that he lost the protection of the Act?

In *Holling Press, Inc.*, 343 NLRB 301, 302 (2004), the Board quoted from *Meyers I* and *Meyers II,*[3] stating:

> The Board reaffirmed that concerted activity included "circumstances in which individual employees seek to initiate or to induce or to prepare for group action," and "activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-

[2] Although I recommend the dismissal of this allegation, I should note that if I had found that this was an investigatory interview I would have found that McMillen need not have requested representation. He arrived at the meeting with Hale as his stated representative. Hale was refused admission by the Respondent on the ground that it was not an investigatory meeting. There would be no need or reason to require McMillen to request to have a representative present for the second time.

[3] *Meyers Industries*, 268 NLRB 493 (1984) and *Meyers Industries*, 281 NLRB 882 (1986).

> organization," so long as what is being articulated goes beyond mere griping.

The underlying question is often whether the employee was simply making a personal complaint (a "gripe") or whether his/her complaint was meant to inure to the benefit of all the employees. If the latter, it comes within the "mutual aid and protection" clause of Section 7. Counsel for the Respondent, at the hearing and in his brief, stressed the fact that McMillen did not say on November 10 that he was there in some capacity on behalf of the Union or that other employees had asked him to speak to Lerro and Bridges at that time. Although that may be a factor in determining whether he was engaged in union or protected concerted activities at that time, it is certainly not controlling of the issue. I find more significant that many of the other pressmen employed by the Respondent were also unhappy about these letters, although they did not react in the same way that McMillen did. In excess of 25 pressmen signed a sarcastic letter to Barker, in response to his letters, telling him to agree to the Union's proposal, Shannon, at the negotiations, strongly objected to these letters on two occasions, and Hale testified that he also did not like receiving these letters. Therefore, while McMillen was alone in the room with Lerro and Bridges when he made the offending remark, he was not alone in his feelings about Barker's letters. In addition, prior to his remark about Barker, McMillen complained about the slow progress of the negotiations as well as Barker's letters. In *Holling Press,* supra, the Board dismissed the complaint because they found that the Charging Party's complaint was "personal" and "individual in nature" and was "not made to accomplish a collective goal. Rather their purpose was to advance her own cause. . . Her goal was a purely individual one."

In *K-Mart Corp.*, 341 NLRB 702, 703 (2004), the Board found that an employee who had used obscenities in response to being notified that he could no longer take his breaks in the lobby, as had been his practice, was not engaged in concerted activities. The Board found that there was no evidence that he was acting on the authority of, or with other employees in protesting the break rules, and that there was no evidence that the union had taken a position on the break room rules. On the other hand, in *Salisbury Hotel*, 283 NLRB 685 (1987) the charging party was discharged because of her complaints about the change in the employees' lunch hour. Although all the employees complained about the change, the charging party was the most vocal one, and had made a telephone call to the Department of Labor complaining about the change, although the Board found no evidence that any other employee knew that she was going to make the call, nor did they authorized her to call on their behalf. The Board, in finding that the charging party was engaged in concerted activities, stated that her complaints "cannot be considered in isolation." In finding a violation, the Board stated:

> The employees complained among themselves and most, including Resnick, brought the complaint directly to LaPenta. Accordingly, we find the employees were engaged in a concerted effort to convince the Respondent to change its lunch hour policy. Resnick's complaints to the other employees, as well as her individual complaints to the Respondent, were part of that concerted effort.

In the instant matter, McMillen was raising issues with Lerro and Bridges that were shared by the Union and his co-workers-their resentment toward Barker's letters about the negotiations, as well as the slow progress of the negotiations. Although these complaint were spoken in the first person, they were part of the concerted efforts by the other employees, and therefore constituted concerted activities on his part.[4]

The evidence establishes that McMillen was discharged for calling Barker a stupid fucking moron on November 10.[5] The question therefore is whether this language was so egregious that he lost the protections of the Act that would otherwise protect his concerted activities. I find that it was. Barker's letters, while inflammatory, were not untruthful. McMillen could have expressed his anger about the letters without defaming Barker as he did.

There is a very thin line between statements that will be considered protected, and language that is so profane and uncalled for that the speaker loses the protection of the Act. *Aluminum Company of America*, 338 NLRB 20 (2002). The Board stated in *Piper Realty Company*, 313 NLRB 1289, 1290 (1994): "Thus, although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." In *Honda of America Mfg., Inc.*, 334 NLRB 746, 747 (2001), the Board, quoting from *Webster Men's Wear*, 222 NLRB 1262, 1267 (1976) and *American Hospital Association*, 230 NLRB 54, 56 (1977), stated: "An employee's Section 7 rights 'may permit some leeway for impulsive behavior.' Nevertheless, an employee's otherwise protected activity may become unprotected 'if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language.'" The accepted test for whether the language warrants the loss of protection is set forth in *Atlantic Steel Co.*, 245 NLRB 814 816 (1979). The four factors in this determination are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

The first factor, the place of the discussion, weighs in favor of protection. It took place in the office with only the supervisors, Lerro and Bridges present. I find it likely that McMillen closed the door after entering the office, but even if he didn't there is no evidence that any other employee overheard what he said or that it was disruptive to the operation of the pressroom. The second factor, the subject matter of the discussion, also

[4] I find no evidence to support the claim that McMillen was terminated because of his union activities. Although he was a union member and attended one series of bargaining sessions, there is no evidence connecting this with his termination.

[5] I find that it was the language that he employed, rather than simply his complaints about the letters, that caused his discharge. In excess of 25 employees, including McMillen, signed the November 4 letter to Barker, which was critical of their working conditions in a cynical tone, but there is no evidence that any of the signers were disciplined because of it.

favors protection. McMillen was complaining to Lerro and Bridges about the slow progress of the negotiations and Barker's latest letter to the bargaining unit employees about negotiations. These letters had also been the subject of complaints by employees and Shannon and resulted in the November 4 letter to Barker from more than 25 employees expressing their anger at his letters, and I have found that the initiation of the discussion with Lerro and Bridges about this subject therefore constituted concerted activities.

The third factor, the nature of the outburst, is the most difficult of these factors. In *Daimler Chrysler Corp.*, 344 NLRB 1324 (2005), after the supervisor suggested that the grievance discussion take place the following week, the employee called the supervisor an "asshole" and said, "Bullshit, I want this meeting now." He also said, "Fuck this shit" and that he did not "have to put up with this bullshit." During this period there were quite a few other employees in the area. The Board found that because he was "insubordinate and profane" during this discussion, and because "the profanity involved more than a single spontaneous outburst," the third factor in *Atlantic* Steel weighed against protection. In *Winston-Salem Journal*, 341 NLRB 124, 126 (2004), enf. denied, 394 F.3d 207 (4th Cir. 2005) a supervisor, at a crew meeting, told the employees that their teamwork needed improvement. The charging party, interrupted him by saying that he did not treat all the employees equally, and called him a racist and said that the employer was a racist place to work. In its analysis, the Board found that the third factor weighed in the charging party's favor because, although he interrupted the supervisor and called him a racist, "this conduct was not so inflammatory as to lose the protection of the Act." In the *Stanford Hotel*, 344 NLRB 558 (2005), the supervisor asked the charging party why he wanted to become a member of the union, told him that he was a supervisor and could not be in the union, and threatened to fire him unless he told the union agent that he was a supervisor. The charging party called the supervisor a liar and a bitch, and loudly called him a "fucking son of a bitch." The Board found that because the charging party's outburst was "profane and offensive" this third factor weighed against a finding that his outburst was protected. However, because this outburst was provoked by the employer's unlawful threat of discharge, the Board found that the fourth factor, in addition to the first two factors, weighed in favor of protection. With three factors in favor and one against protection, the Board found that the charging party did not lose the protection of the Act by his conduct.

In *Felix Industries, Inc.*, 331 NLRB 144 (2000), remanded 251 F.3d 1051 (D.C Cir. 2001), 339 NLRB 195 (2003), in response to a question of whether he would be paid the night differential, the supervisor told the charging party that he would get every penny that he was entitled to, but that he could not believe that he was making an issue of it, that the company had never beat anybody out of any money, and that he was tired of "carrying" the employee. The charging party responded, "You're a fucking kid. I don't have to listen to a fucking kid. Things were a lot different before you were here." When the supervisor asked what he had called him, he repeated, "fucking kid." The majority of the Board, in finding the resulting discharge a violation, in the discussion of the third factor, stated that it "consisted of a brief, verbal outburst of profane language, unaccompanied by any threat or physical gesture or contact" and therefore weighed in the favor of protection. The Court, at p. 1055, remanded the case to the Board stating: "If an employee is fired for denouncing a supervisor in obscene, personally denigrating, or insubordinate terms—and Yonta here managed all three with economy—then the nature of his outburst properly counts against according him the protection of the Act." The Court then stated: "Yonta's statements do weigh against protection. Whether they weigh enough to tip the balance in that direction is for the Board to decide on remand." On remand, a majority of the Board again found that the termination violated the Act, noting that the Court agreed with the Board that none of the three other *Atlantic Steel* factors (1, 2, and 4) weighed in favor of him losing the protection of the Act:

> After careful consideration in light of the court's instructions on remand, we find that although the nature of Yonta's outburst must be given considerable weight toward losing the Act's protection, this one factor is insufficient to overcome the other factors weighing against Yonta losing the Act's protection. . . A careful examination of these factors reveals that they clearly outweigh the one factor weighing in favor of Yonta losing the Act's protection, the nature of the outburst.

On the basis of the above cases, I find that the nature of the conduct that McMillen engaged in on the evening of November 10 weighs in favor of his losing the protection of the Act under *Atlantic Steel.* Although there were no threats or physical gestures directed at Lerro or Bridges, his comments directed at Barker were profane, offensive, and personally denigrating. The evidence establishes that while profanity in the press room was fairly common, it was usually directed at machinery that was not operating properly, and none of the witnesses could recall a situation where an employee directed profanity at a supervisor such as McMillen did on November 10. Donoghue's testimony that in either 2000 or 2001 Lerro told him that after a foreman gave him a last minute assignment, he called him a fucking idiot is too indefinite to overcome this evidence. It is not clear whether Lerro was a pressman at the time, to whom he made the statement and whether it was made in jest. Finally, the fourth factor, whether the outburst was provoked by unfair labor practices, favors McMillen losing the protection of the Act. While the letters were clearly partisan, and angered many of the employees, as well as Shannon, there was nothing untruthful in them and Barker clearly had a right to express his opinion about the negotiations, as the employees had the right to respond to Barker's letter in their November 4 letter. As there were no unfair labor practices to provoke his outburst, this fourth factor weighs in favor of his losing the protection of the Act. As I find that the first two factors weigh in favor of protecting McMillen's conduct, while the third and the fourth factor weigh against protecting him, it tips the balance in favor of the loss of protection. I therefore recommend that the allegation that the Respondent violated Section 8(a)(1) of the Act by discharging McMillen on November 16, 2007, be dismissed.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) of the Act by refusing to allow McMillen to have union representation at the November 16 meeting, and did not violate Section 8(a)(1)(3) of the Act by discharging McMillen on November 16.

On these findings of fact, conclusions of law, and based upon the entire record, I hereby issue the following recommended[6]

ORDER

It is recommended that the Complaint be dismissed in its entirety.

Dated, Washington, D.C., February 22, 2007

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.